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In The

Supreme Court of the United States

October Term, 1992

STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA,

Petitioner,

v.

MCDONNELL DOUGLAS CORPORATION,

Respondent.

Petition For Writ Of Certiorari To The Court Of Appeal Of The State Of California In And For The Second Appellate District, Division One

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Import-Export Clause of the United States Constitution (Art. I, sec. 10, cl. 2) bar California from applying its sales tax to the sale of $6,968,252 worth of airplane replacement parts sold by the California taxpayer in California, when the parts were shipped via U.S. common carrier from the taxpayer's facilities in Long Beach, California, "F.O.B. Long Beach", to San Ysidro, California, and when the purchaser had no existing obligation to export the parts upon their arrival in San Ysidro?

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**Petition For Writ Of Certiorari
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PETITION FOR WRIT OF CERTIORARI

This petition for writ of certiorari seeks this Court's review of the judgment and opinion of the California Court of Appeal, Second Appellate District, after denial of review by the California Supreme Court on February 11, 1993. Unless this Court acts, state revenues will be seriously eroded through the erroneous application of Import-Export Clause to bar application of sales taxes merely because goods are sold to foreign companies, when those goods are shipped to a destination within the same state instead of exporting them. Summary reversal would be appropriate.

OPINIONS BELOW

The minute order of the California Superior Court (Appendix "A") is an unreported decision. The opinion of the Court of Appeal, Second Appellate District (Appendix "B") was reported at 10 Cal. App. 4th 1413 and Cal. Rptr. 2d 399. The California Supreme Court denied review of February 11, 1993 without opinion (Appendix "C").

JURISDICTION

The California Court of Appeal has held that the Import-Export Clause of the United States Constitution (Art. I, sec. 10, cl. 2) bars California from applying its sales tax to goods in this case prior to their becoming exports. On February 11, 1993 the California Supreme Court denied review of the Court of Appeal decision without opinion. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

STATUTES INVOLVED

United States Constitution, Section 10, Clause 2 (Import-Export Clause):

No State shall, without the consent of the Congress, lay any imposts or duties on Imports or Exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the Treasury of the United States; and all

such laws shall be subject to the revision and control of the Congress."

California Revenue and Taxation Code § 6006

(a): " 'Sale' means and includes any transfer of title or possession, exchange or barter, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for consideration. 'Transfer of possession' includes only transactions found by the board to be in lieu of a transfer of title, exchange, or barter."

California Commercial Code § 2401(2)(a):

"Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to physical delivery of the goods, despite any reservation of a security interest and even though a document of title is to be delivered at a different time or place; and in particular and despite any reservation of a security interest by bill of lading: (a) If the contract requires or authorizes the seller to send the goods to the buyer at the time and place of shipment."

STATEMENT OF CASE

Between January 1, 1978 and December 31, 1980, McDonnell Douglas Corporation ("the taxpayer") sold $6,968,252 worth of aircraft replacement parts to Aeromexico ("the purchaser"). The orders for the parts emanated from the purchaser's Mexico City maintenance department. The parts were shipped "F.O.B. Long Beach",

via common carrier, from the taxpayer's Long Beach facility to a freight forwarder's facilities in San Ysidro, California. (C.T. 27.) The purchaser's employees used the facilities in San Ysidro to assist in preparing the goods for their next shipment to Mexico. The participation of the freight forwarder was limited to providing facilities. Bills of lading for shipping the parts were issued by the seller in Long Beach for the intrastate shipment to San Ysidro and by the purchaser at San Ysidro for the next shipment to Mexico. (C.T. 114.)

Based on these transactions the Board issued a Notice of Determination to the taxpayer on July 3, 1985 for sales tax in the amount of $348,413 and interest of $291,476. The taxpayer paid the assessed deficiency and filed a claim for refund, claiming that the transactions in question were immune from taxation and that the goods transported from Long Beach to San Ysidro, California were in the constitutionally protected "export stream". The Board denied the taxpayer's claim.

The taxpayer filed a Complaint for Recovery of Sales and Use Taxes Paid with the Superior Court of the State of California for the County of Los Angeles. The taxpayer's complaint contended that the aircraft replacement parts were exempt from sales tax because they were in the process of exportation during their journey from Long Beach, California to San Ysidro, California. The Los Angeles Superior Court entered judgment that the taxpayer take nothing, determining that the aircraft replacement parts did not enter the "export steam" until they left San Ysidro, California because they had not started on their "final and continuous journey" until they left San Ysidro, California. (C.T. 113).

The taxpayer appealed this judgment to the Court of Appeal of the State of California, Second Appellate District, Division One, on September 19, 1991. The Court of Appeal entered its judgment reversing the decision of the Superior Court.

The Board filed a petition for review with the Supreme Court of the State of California seeking review of the decision of the California Court of Appeal. The Supreme Court of the State of California denied the petition on February 11, 1993.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE COURT OF APPEAL CONFLICTS WITH THE DECISIONS OF THIS COURT BY HOLDING THAT A SOLELY INTERIOR MOVEMENT OF GOODS WITHIN A STATE PROVIDES CONSTITUTIONAL IMMUNITY FROM STATE SALES TAX

The trial court, based upon the evidence presented at trial and the record, correctly concluded that the parts which the taxpayer sold to purchaser Aeromexico, which comprise the transactions which the taxpayer claims were exempt from taxation, were not within the constitutionally protected "export stream" when they were shipped from Long Beach, California "F.O.B. Long Beach" by U.S. common carrier to employees of the purchaser at San Ysidro, California because they had not started on their "final and continuous journey." (C.T. 113.) The Export Clause of the United States Constitution is not intended to prohibit a tax on goods merely awaiting

export. An article eventually to be exported does not begin to be an "export", and thus entitled to the protection of the Import-Export Clause, until the article begins its physical entry into the stream of exportation. *Coe v. Errol*, 116 U.S. 517 (1886). The parts were not in transit to Mexico, but rather were in transit to San Ysidro, California, the final destination of the U.S. common carrier.

Without specifying how, when, or why the parts in question entered the constitutionally protected "export stream" during their intrastate journey the California Court of Appeal merely concluded that the parts entered the "export stream" despite the fact that the purchaser took title to the parts at Long Beach, California when they were shipped "F.O.B. Long Beach", and despite the fact that they had not started on their "final and continuous journey." (C.T. 113.)

Pursuant to California law any transfer of "title or possession of tangible personal property . . . for consideration is a sale." California Rev. & Tax Code § 6006. Under applicable California law the transfer of title to the aircraft parts to the purchaser by the taxpayer, at Long Beach, California constituted a sale. The U.S. common carrier merely transported the goods from Long Beach, California to San Ysidro, California where the common carriers obligation ended. The evidence showed that the purchaser had no obligation to export the goods outside the United States at the time the goods arrived at San Ysidro, California from Long Beach. (R.T. 38.) Under the circumstances there was nothing whatsoever which prevented the purchaser from using the parts in California, thereby completely evading the application of the sales tax under the guise of constitutional protection.

The fact that the goods ultimately made their way into Mexico is not significant. "The Export-Import Clause of the United States Constitution was meant to confer immunity from local taxation upon property being exported, not to relieve property eventually to be exported from its share of cost of local services." *Joy Oil Co. v. State Tax Comm'n.*, 337 U.S. 286, 288 (1949). Goods do not cease to be part of the general mass of property within the State, subject, as such, to its jurisdiction, and to taxation in the usual way, until they have been shipped, or entered with a common carrier for transportation to another state, or have started upon such transportation in a continuous route or journey. " . . . [P]roducts are not yet exports, nor are they in the process or exportation, nor is exportation begun until they are committed to the common carrier for transportation out of the State to the State of their destination, or have started on their ultimate passage to that State. Until then it is reasonable to regard them as not only within the State of their origin, but as a part of the general mass of property of that State, subject to its juridsiction, and liable to taxation there . . . " *Coe v. Errol*, 116 U.S. 517, 525 (1886).

The trial court after listening to the evidence determined that the parts "had not started on their final and continuous journey until they left San Ysidro" because the U.S. common carrier was used solely to accomplish an intrastate transportation of the goods from Long Beach to San Ysidro. The evidence before the trial court clearly showed that the purchaser was under absolutely no obligation to export the airplane parts at the time they arrived at San Ysidro, California. (R.T. 38) Therefore the

decision of the California Court of Appeal, Second Circuit, is erroneous and clearly conflicts with this Court's decisions in the *Coe*, and *Joy Oil* cases.

II.

THERE WAS NO CERTAINTY OF FOREIGN DESTINATION WITH RESPECT TO THE INTRASTATE TRANSPORTATION OF THE PARTS; THE TRANSACTIONS IN QUESTION WERE NOT ENTITLED TO CONSTITUTIONAL IMMUNITY FROM TAXATION

The proper test to be applied to a transaction in order to determine whether constitutional immunity from state taxation is appropriate focuses on whether the goods in question have been committed for export to a foreign destination and will not be diverted to domestic use so as to evade the proper application of tax. *Empressa Siderurgica v. Merced Co.*, 337 U.S. 154, 157 (1949). ". . . It is not enough that there is an intent to export, or a plan which contemplates exportation, or an integrated series of events which will end with it." *Ibid* at p. 156.

This Court in *Brown v. Houston*, 114 U.S. 622 (1885) declared that where a tax is laid on all property alike, it cannot be construed as a duty upon exports under the Import-Export Clause when falling upon goods not then intended for exportation, although the goods should happen to be exported afterwards.

The trial court properly employed this analysis and determined that the parts were not in the "exportation process" at the time they left Long Beach, California

where title passed to the purchaser. (C.T. 113.) The purchaser obtained title to the parts in Long Beach, California when they were shipped by U.S. common carrier, "F.O.B. Long Beach". (California Commercial Code § 2401(2)(a)). Under applicable California law this transfer of title constituted a sale for sales tax purposes. (California Revenue and Taxation Code § 6006).

In this case the U.S. common carrier's journey ended in San Ysidro, California and the purchaser was under no existing obligation to export the parts upon their arrival in San Ysidro. The goods did not merely stop at San Ysidro to complete the export process. "Certainty of foreign destination" was not plain; it plainly did not exist. Where an item not committed to export has not yet begun its final movement from the state of its origin to the country of its destination it is not immune from nondiscriminatory local taxation. *Kosydar v. National Cash Register Co.*, 417 U.S. 62 (1974).

Contrary to the evidence presented, which showed that there was no legal obligation to export the airplane parts when they arrived at San Ysidro, California, the California Court of Appeal reversed the trial court and held that the parts in question were in the constitutionally protected "export stream"

The decision of the California Court of Appeal, is contrary to existing law. No cited case holds that a solely intrastate movement of goods provides constitutional immunity from taxation. Only articles "in the stream of commerce" are entitled to constitutional protection from state sales tax because, "though intended for exportation,

they may never be exported; the owner has a perfect right to change his mind." *Coe v. Errol*, 116 U.S. 517, 525 (1885).

On February 23, 1993, after the California courts' final action in this case, this Court rejected an attempt to use the Import-Export Clause to bar the states from imposing a state sales tax upon container lease transactions; this Court held that the tax was not upon importation but was "a tax on a business transaction occurring within the taxing state." *Itel Containers Intern. Corp. v. Huddleston*, ___ U.S. ___, 113 S.Ct. 1095, 1106 (1993). Now the states must again look to this Court for protection of their power to impose sales tax on business transactions which occur totally within the seller's state this time for sales transactions which are fully concluded before the purchaser is committed to export the goods whose sale gave rise to the assessment of the tax.

CONCLUSION

Under applicable California law a "sale" of the taxpayer's airplane parts took place in California when title was transferred to the purchaser in Long Beach, California. Cal.Rev. & Tax Code § 6006; California Commercial Code § 2401(2)(a). Unless the parts are in the constitutionally protected "export stream" at the time the sale took place the transaction is subject to a sales tax. The Los Angeles Superior Court correctly held that the parts, "were not in the exportation process at the time they left Long Beach California" and "did not enter the stream of exportation until they left San Ysidro." (C.T. 113.) The California Court of Appeal, erroneously concluded that

the parts were not subject to California Sales Tax during their journey from Long Beach, California to San Ysidro, California because the parts were already in the constitutionally protected process of exportation, despite the fact that title passed to the purchaser in Long Beach and the purchaser had the option to use the parts within California at the time they arrived in San Ysidro, California. The decision of the California Court of Appeal ignores and is contrary to this Court's decision in the *Coe v. Errol, Empresa Siderurgica v. Merced Co., Joy Oil Co. v. State Tax Comm., Kosydar v. National Cash Register* and the *Brown v. Houston* cases. For the foregoing reasons, a writ of certiorari should issue to review the opinion and judgment of the California Court of Appeals, Second Appellate District, Division One in the present case. Particularly in light of this Court's subsequent application of the Import-Export Clause in *Itel Containers Intern. Corp.*, supra, the California appellate court's misapplication of the Import-Export Clause is so clearly erroneous that a summary reversal would be appropriate in this case.

Respectfully submitted,

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